BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSHUA L. DAMRON	)	
Claimant	)	
	)	
VS.	)	
	)	
COBALT BOATS	)	
Respondent	)	Docket No. 1,063,457
	)	
AND	)	
	)	
UNITED WISCONSIN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 14, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to establish his December 19, 2011, work accident is the prevailing factor in causing his current need for treatment. The ALJ denied claimant's preliminary hearing request for medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 12, 2014, Preliminary Hearing and the exhibits, and the transcript of the March 13, 2014, deposition of Dr. Vito Carabetta and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he proved his ongoing need for medical treatment is due to the December 2011 incident at respondent. Claimant maintains his December 2011 injury is the prevailing factor in his current need for medical treatment, and therefore, the ALJ's Order should be reversed.

Respondent contends the Board lacks jurisdiction to review this appeal as it focuses on whether claimant is entitled to additional medical treatment. Alternatively, respondent argues claimant failed to establish that it is more true than not true he requires additional medical treatment for his workplace injury with respondent.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review claimant's appeal?

2. If so, did the ALJ err in finding claimant failed to prove his December 19, 2011, work-related accident was the prevailing factor in causing his current need for medical treatment?

FINDINGS OF FACT

Claimant began employment with respondent April 20, 2011, as a boat builder. Claimant would physically roll the boats on a dolly to a water tank for testing. On December 19, 2011, claimant and coworkers were removing a boat from a test tank when claimant slipped on the wet floor and fell. Claimant explained, "I lost traction and slipped, my hand slipped off of the stainless steel bar they put around the swim platform and I hit my lower back, my left knee and left elbow on the floor."[1]

Claimant testified he experienced pain following his fall, and he reported the incident to respondent within 20 minutes of the incident. Respondent referred claimant to Dr. Bert Chronister in Neodesha, Kansas. Dr. Chronister ordered x-rays and prescribed medication and physical therapy. Claimant completed physical therapy as directed. Eventually, claimant had full range of motion of his trunk without any pain and was released to full duty by Dr. Chronister on February 1, 2012. Claimant stated he did not tell Dr. Chronister he required additional medical care. Claimant told Dr. Chronister he "felt very fit and capable to return to [his] normal job duties."[2]

Claimant returned to work for respondent, initially with some restrictions. In March 2012, approximately one to two weeks after resuming his full duties, claimant was terminated by respondent for absenteeism. Claimant testified his attendance issues were unrelated to his work-related accident.

Following his termination, claimant worked at three subsequent employers between May and August 2012. Claimant stated he quit two of these jobs because standing in one position on concrete caused pain in his lower back. He indicated his low back symptoms

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[1] P.H. Trans. at 16.

[2] *Id*. at 34.

would wax and wane during this time period but always returned to a base level of 3 to 4 on a pain scale of 1 through 10. Claimant has not worked since August 2012.

On Saturday, November 10, 2012, claimant dug a trench measuring approximately 10 feet long by 6 inches deep with a small hand spade. Claimant testified he was digging out an existing water line to lay a new water line beside it. He stated the dirt was loose, and he sat while digging the trench. Claimant testified he was "fine" that same day, but the next day he woke "hurting very badly."[3]

Claimant presented to Dr. Oswaldo Bacani on November 12, 2012, with low back pain. He indicated to Dr. Bacani he injured his back at respondent on December 19, 2011, and his back was "really hurting" after digging a trench the previous Saturday.[4] Dr. Bacani performed a physical examination, diagnosing claimant with lumbar strain and low back pain. Dr. Bacani prescribed pain medication and muscle relaxants. Claimant was to follow up with Dr. Bacani if problems developed or his symptoms worsened. Claimant testified he returned to Dr. Bacani a second time to change his medication. Claimant stated the new medication worked better than the original and reduced his pain to the base level of three to four.

Claimant next visited Dr. Robert Thomen on January 28, 2013. Claimant gave Dr. Thomen a history of a work injury occurring December 19, 2011, but did not mention digging a trench. Claimant reported to Dr. Thomen back pain in the lumbar area on the left side which intermittently radiates down into the leg, sometimes reaching to the foot with tingling and pain into the foot and toes. After performing a physical examination, Dr. Thomen diagnosed claimant with back pain. Dr. Thomen prescribed muscle relaxants and anti-inflammatory medication, requested the previous CT scan and x-rays taken by Dr. Chronister, and directed claimant to return to his office for follow-up in two weeks.

Dr. Thomen reviewed claimant's December 19, 2011, x-rays and informed claimant a disk was protruding in his spine. Dr. Thomen recommended claimant undergo an MRI. Claimant testified he was uncertain what the MRI revealed, but Dr. Thomen recommended claimant see an orthopedic specialist.

Claimant eventually retained counsel, who referred him to Dr. George Fluter on April 2, 2013, for purposes of an independent medical evaluation (IME). Claimant presented with pain in his low back, left hip, left lower extremity, and left foot. Claimant rated this pain at a level of 8 on the pain scale of 1 through 10. Claimant reported to Dr. Fluter the pain was constant with no pattern and occurs every day. He also advised Dr. Fluter of partial loss of bladder control with very sharp pain occurring weekly since the injury. After

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[3] *Id*. at 22-23; Resp. Ex. B at 1.

[4] *Id*., Resp. Ex. B at 1.

reviewing claimant's history, available medical records, and performing a physical examination, Dr. Fluter assessed claimant with status post work-related injury on December 19, 2011, low back/left lower extremity pain, lumbosacral strain/sprain, probable left lower extremity radiculitis, probable sacroiliac joint dysfunction, and probable trochanteric bursitis. Dr. Fluter opined:

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported work-related injury occurring on 12/19/11.
>
> The prevailing factor for the injury and need for medical evaluation/treatment is the reported work-related injury occurring on that date.[5]

Dr. Fluter recommended temporary restrictions and conservative treatment initially, as well as physical therapy and imaging studies of the lumbar spine and bilateral lower extremities. Dr. Fluter noted interventional pain management procedures and/or surgical consultations may be indicated dependent upon claimant's response to conservative treatment.

Dr. Vito Carabetta performed a court-ordered IME of claimant on October 1, 2013. Claimant complained of low back pain and left sciatica with sharp pain across the lumbosacral region. Claimant did not report bowel or bladder incontinence or radiation of the low back pain into the lower extremities. Dr. Carabetta reviewed claimant's history and available medical records prior to performing a physical examination. Dr. Carabetta noted the MRI ordered by Dr. Thomen was not included in the available medical records. Dr. Carabetta diagnosed claimant with low back pain and left sciatica. Dr. Carabetta then informed the court he required the results of the MRI scan for further review and assessment.

In a letter to the ALJ dated December 20, 2013, Dr. Carabetta reported his receipt of claimant's prior MRI results. He noted the MRI demonstrated a limited central disk protrusion at the lumbosacral level which bulged essentially at the midline. Dr. Carabetta informed the ALJ:

> The physical examination did show some troubling findings that suggested compromise of the fifth lumbar nerve root, but at the same time there was a substantial amount of subjective overlay. With this being still in doubt, and the patient reporting substantial continuation of symptoms, I would advise to move in the direction of further treatment.[6]

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[5] P.H. Trans., Cl. Ex. 1 at 4.

[6] Carabetta Depo., Ex. 2 at 1.

The ALJ, with concurrence of counsel, authorized Dr. Carabetta to provide conservative treatment, including epidural injections, pending Dr. Carabetta's deposition. On March 13, 2014, Dr. Carabetta testified he was unable to give a concrete opinion as to the prevailing factor in claimant's current need for treatment. He stated:

> I cannot be certain that the original injury is the prevailing factor. What appears to be the case is that the incident with the digging of the ditch provoked the symptoms. But the symptoms have also backed down, from his estimation, back to where he had been prior.[7]

Dr. Carabetta testified the action of digging the trench was certainly an aggravation of claimant's preexisting condition, but without MRI results from both before and after the digging incident, he could not say whether it was a permanent aggravation. Dr. Carabetta noted:

> Obviously this cuts to the root of the question in terms of how the judge has to deal with this. With absolute certainty the prevailing factor is up for grabs. We don't know within a reasonable degree of medical certainty how much of the impact digging the hole was versus how much the original one was.[8]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . . .

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[7] Carabetta Depo. at 40.

[8] *Id*. at 19-20.

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510h states, in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing,

> medicines, medical and surgical supplies, ambulance, crthces, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> (b)(1)If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of two health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

1. Does the Board have jurisdiction to review claimant's appeal?

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues listed in K.S.A. 2013 Supp. 44-534a(a)(2). Those issues are: (1) whether the employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.[11] The Board can also

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2013 Supp. 44-555c(j).

[11] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.[12]

Respondent argues the Board lacks jurisdiction to review the ALJ's denial of compensation. However, the Board has held that when the underlying point of contention is whether claimant's accident was the prevailing factor in causing the medical condition, the Board has jurisdiction under K.S.A. 2013 Supp. 44-534a.[13]

2. Did the ALJ err in finding claimant failed to prove his December 19, 2011, work-related accident was the prevailing factor in causing his current need for medical treatment?

The undersigned Board Member disagrees with the ALJ's finding regarding prevailing factor. Regarding the causation of claimant's injury and need for medical treatment, Dr. Fluter stated there is a causal connection between claimant's work-related injury, and the prevailing factor for the need for medical evaluations/treatment is the reported work-related injury.

Dr. Fluter's prevailing factor leaves no room for interpretation. There is no evidence in the record that would suggest Dr. Fluter lacks the qualifications to provide an opinion on causation or that his opinions lack credibility. Based solely on the opinions provided by Dr. Fluter, claimant has proved it is more probably true than not true the prevailing factor for his need for medical treatment is the work-related injury of December 19, 2011.

The only controverting evidence to Dr. Fluter's opinions are the opinions provided by Dr. Carabetta. Dr. Carabetta's opinions on prevailing factor are equivocal and do leave room for interpretation. Dr. Carabetta first stated the prevailing factor was "up for grabs."[14] He then agreed the December 19, 2011, injury was the prevailing factor for treatment initially provided by Dr. Chronister.[15] Dr. Carabetta later testified he "cannot be certain that the original injury is the prevailing factor."[16] Finally, Dr. Carabetta, when asked if he was saying he could not give a prevailing factor opinion, stated, "I can't really stick my neck out there and be certain on this one."[17]

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[12] K.S.A. 2013 Supp. 44-551(l)(2)(A).

[13] *Wilson v. Triangle Trucking, Inc.*, No. 1,063,281, 2013 WL 6920087 (Kan. WCAB Dec. 20, 2013); *Kornmesser v. State of Kansas*, No. 1,057,774, 2013 WL 3368484 (Kan. WCAB June 14, 2013).

[14] Carabetta Depo. at 20.

[15] *See Id*. at 32.

[16] *Id*. at 40.

[17] *Id*. at 43.

When taken *in toto*, Dr. Carabetta's opinions do not lead to a conclusion it is more probable than not claimant's injury was not the prevailing factor for his need for medical treatment.

In his clinical note of February 18, 2014, Dr. Carabetta recommended epidural steroid injections, medications, and a possible surgical referral. Dr. Fluter recommend the same treatment options, in addition to several other testing and treatment options.

CONCLUSION

The Board has jurisdiction to review claimant's appeal. The ALJ erred in finding claimant failed to prove his December 19, 2011, work accident was the prevailing factor in causing his current need for medical treatment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 14, 2014, is reversed and remanded for the ALJ to issue a new Order consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of June 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge